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80-1509
No. .....

In The
Supreme Court of the United States
October Term, 1980

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

LADIES CENTER, NEBRASKA, INC., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

WOMENS SERVICES, P.C., et al.,
Appellees,

vs.

CHARLES THONE, Governor of the State of Nebraska, et al.,
Appellants.

On Appeal from the United States Court of Appeals for the Eighth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether state legislation regulating the performance of abortions during the first trimester is in all instances subject to strict scrutiny under a substantive due process analysis.

2. Whether the record supports a finding that the challenged statutes unduly burden the right to seek an abortion.

3. Whether it is constitutionally permissible for a state to require by regulation that every minor who seeks the performance of an abortion affirm in writing to her physician that she has consulted with her parents.

4. Whether criminal accomplice liability creates direct threat of personal detriment and therefore gives rise to standing.

5. Whether the trial court erred in declining to abstain.

LIST OF PARTIES

The names of the parties to the action below are set out as follows:

Appellants, Charles Thone, Governor of the State of Nebraska; Paul L. Douglas, Attorney General for the State of Nebraska; Donald L. Knowles, County Attorney for County of Douglas, State of Nebraska;

Intervenor, Marilyn A. Schneider;

Appellees, Womens Services, P.C., a Nebraska Corporation; William G. Orr, M.D.; Ladies Center, Nebraska, Inc., a corporation; John M. Epp, M.D., Betty Roe, by her next friend, Barbara Gaither; and Elizabeth F.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of United States District Court Judge Warren K. Urbom is reported at 483 F. Supp. 1022 and appears as Appendix ("App.") A hereto. The opinion of Judge Warren K. Urbom issued August 1, 1979, which granted partial summary judgment declaring Neb. Rev.

Stat. § 28-333 (Reissue 1979) (parental consultation) unconstitutional is unreported and appears as App. B hereto. The Order of Judge Warren K. Urbom issued on August 9, 1979, which denied defendants' motion to dismiss based on the abstention doctrine is unreported and appears as App. C hereto.

The per curiam opinion of the Eighth Circuit Court of Appeals is unreported and appears as App. D hereto.

JURISDICTION

This is a civil rights action brought pursuant to 42 U. S. C. § 1983 which challenges the constitutionality of certain abortion control statutes enacted by the State of Nebraska. This appeal is taken from a final order of the Eighth Circuit Court of Appeals which held certain portions of those statutes to be invalid as repugnant to the Fourteenth Amendment of the Constitution of the United States.

The date of the decree by theEighth Circuit Court of Appeals was December 8, 1980. Appellants' notice of appeal was filed in the Eighth Circuit Court of Appeals on January 7, 1981 (App. G).

Jurisdiction is conferred upon this Court pursuant to 28 U. S. C. § 1254 (2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies . . . between a State and Citizens of another State; —between Citizens of different States, . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

United States Constitution, Article XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Neb. Rev. Stat. § 28-325, et seq. (Reissue 1979).

The statutes cited above are lengthy; therefore, their pertinent text is set forth in App. E hereto.

STATEMENT OF THE CASE

These three consolidated cases are civil rights actions challenging certain abortion control statutes enacted by the State of Nebraska. *See,* App. E. At issue here are statutes which require: (1) that a woman seeking an abortion must affirm in writing that she has been advised of the reasonably possible medical and mental consequences of abortion, childbirth and pregnancy; (2) a waiting period of forty-eight hours following the execution of an informed consent document; (3) a statement signed by a minor seeking an abortion proclaiming that she has consulted with her parents; and (4) the reporting of prescribed abortions to the Nebraska Department of Health. Also at issue is the *standing* of the plaintiff abortion clinic. Ladies Center, Nebraska, Inc., and the application of the doctrine of *abstention* to the informed consent statute, Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979).

On August 1, 1979, the court granted plaintiffs partial summary judgment with respect to parental consultation, Neb. Rev. Stat. § 28-333 (Reissue 1979). On August 9, 1979, the court entered a pretrial order in which it declined to abstain from ruling on the informed consent language of the challenged statute, Neb. Rev. Stat. § 28-326 (8) (a). After a full hearing on the remaining issues, the court entered a memorandum and order dated November 9, 1979, in which it held:

(1) That a subpart of the statutory definition of informed consent, Neb. Rev. Stat. § 28-326 (8) (a) was an unconstitutional abortion regulation.[1]

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1 Neb. Rev. Stat. § 28-327 prohibits the performance of an abortion in the absence of an "informed consent" which

(Continued on next page)

(2) That the forty-eight hour waiting period, Neb. Rev. Stat. § 28-327 was an unconstitutional abortion regulation.

(3) That Neb. Rev. Stat. § 28-343, as it pertained to "prescribed abortions" was an unconstitutional abortion regulation.

In a per curiam opinion issued December 8, 1980, the Eighth Circuit Court of Appeals affirmed the trial court's judgment in all respects and based its affirmance "primarily on the basis of the district court's decision." The Appeals Court added that because of intervening cases of the United States Supreme Court and "for other reasons" it would comment briefly on each aspect of the decision. *See*, App. D, at p. 67. The Appeals Court thereafter specifically held "that legislation which directly interferes with a woman's fundamental right to decide to terminate her pregnancy is subject to *strict scrutiny* under a substantive due process analysis." *See*, App. D, at p. 72. (Emphasis added.)

The opinions of the trial court, App. A, B, and C, and the Eighth Circuit Court of Appeals, App. D, clearly re-

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(Continued from previous page)

term is defined by Neb. Rev. Stat. § 28-326 (8) (a) and which states in relevant part:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, . . .

flect that the questions presented in this appeal were raised both at trial and on appeal.

Substantial testimony was presented at trial in regard to the manner of medical practice of the plaintiffs' abortion clinics and the medical complications of abortions performed at all stages of pregnancy. Included in this latter subject was expert testimony of Dr. Leslie Iffy, an internationally recognized physician, a specialist in the fields of both obstetrics and gynecology and neonatology, and the author of numerous scholarly articles on the subject of long term medical complications of induced abortions[2] (T1598:5-1602:1).[3] Dr. Iffy gave as his principal expert opinion that one single abortion performed during the first trimester closely doubles the rate of premature births in subsequent pregnancies (T1619:7-11). Dr. Iffy further testified that prematurity is the leading cause of death or physical and mental disability in children (T1622:12-25) and that each subsequent abortion relatively increases the risk of prematurity (T1619:7-11).

Appellants at trial also presented evidence that appellee Womens Services, P.C. engaged in virtually no

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2 Of additional note in regard to Dr. Iffy's qualifications and lack of any personal bias was his testimony which reflected his clinical experience of having performed numerous abortions during his twenty-five year plus medical career and the lack of any impeachment evidence that Dr. Iffy has ever expressed or shared in an opinion that abortion is morally wrong.

3 The transcript of trial testimony (T) is in the custody of the Clerk of the Eighth Circuit Court of Appeals. Appellants have not elected, pursuant to Supreme Court Rule 13, to certify the record to this Court since we do not deem it essential, but we do feel that reference to the record is necessary for a proper understanding of the case and its importance.

counseling of its abortion patients (T1033:4-1036:15), that physicians of both of appellees' abortion clinics often never saw the abortion patient until she was on the procedure table, that the clinics were performing abortions on an assembly line basis, and that there was no doctor-patient relationship established (T252:15-264:25; T1268:11-1273:21).

The evidentiary record below also disclosed that only in the most rare of occasions has a woman ever been provided an abortion by either of appellees' abortion clinics within forty-eight hours of her request for medical treatment. The testimony of abortion clinic personnel proved that for the vast majority of abortion clinic patients there was a delay of from seven to ten days between the time the abortion was first requested and its actual performance (T56:5-60:5; T306:16-25; T1024:9-1025:7).

Further testimony of Dr. Leslie Iffy on the issue of a forty-eight hour delay included his personal observation that during the twenty-five plus years he had performed abortions, he had never found it necessary to perform an abortion within forty-eight hours of the patient first having presented herself (T1726:12-20).

Appellees' expert witness, Dr. Christopher Tietze, an internationally recognized medical statistician, testified that a delay of forty-eight hours during the first trimester would be "clinically unimportant." When asked to define "clinically unimportant," Dr. Tietze stated, "I would draw no conclusion as to whether it was desirable to do it [abortion] earlier or to do it later." (T957:3-6).

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THE QUESTIONS ARE SUBSTANTIAL

ARGUMENT

I.

This appeal raises an important and recurring issue regarding the proper legal standard of review to be used by federal courts in judging the constitutionality of state statutes regulating the performance of abortions.

This appeal involves laws enacted by the State of Nebraska which have as their primary aim the protection of the decision making process of women who seek abortions. Succinctly described, they require (1) the signing of a written statement by the woman and her physician which affirms that she has been informed of certain medical information, and (2) the passing of forty-eight hours—unless there is "an emergency situation"[4]—before the abortion may be performed. In holding these laws unconstitutional the Eighth Circuit Court of Appeals clearly identified the legal standard of review used both by it and the trial court to test the constitutionality of the challenged statutes by stating, "We agree that legislation which directly interferes with a woman's fundamental right to decide whether to terminate her pregnancy is subject to strict scrutiny under a substantive due process analysis." App. D, at p. 72. The Eighth Circuit Court of Appeals cited as authority *Charles v. Carey*, 627 F. 2d 772 (7th Cir. 1980), which case more extensively discusses the conflict and controversy

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4 "Emergency situation" is defined within the statutes. *See*, Neb. Rev. Stat. § 28-326 (7) found at App. E at p. 76.

which has arisen over which legal standard of review is applicable to state legislation which attempts to expand upon the Supreme Court's stated approval of legislation which insures that the abortion decision "be made with full knowledge of its nature and consequences." *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 67 (1967). Those favoring a more detailed informed consent than that found in *Danforth* and the inclusion of a requirement for a waiting period to insure that the informed consent information can be carefully weighed by the woman[5] have advocated that reviewing courts impose upon those parties challenging such legislation the requirement of showing an "undue burden" on the abortion decision making process before the challenged laws are made subject to "strict scrutiny." Directly supporting this relaxed standard of review is the following language of this court:

> In *Planned Parenthood of Central Missouri v. Danforth* we today struck down a statute that created a parental veto. . . . At the same time, however, we held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion.

Bellotti v. Baird, 428 U. S. 132, 147 (1976). In similar language in *Maher v. Roe*, 432 U. S. 464, 473 (1977), this Court held:

> Although a state-created obstacle need not be absolute to be impermissible, . . . we have held that a re-

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5 The need for thorough counseling coupled with the waiting period is not only advocated by legislative bodies in this country but in Europe as well. *See*, M. Wood and W. Cole, Jr., *Counseling, Consulting, and Consent: Abortion and the Doctor-Patient Relationship*, 1978 B. Y. U. L. Rev. 826-827.

> quirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." [Citations omitted.]

Id.

It is thus argued by those supporting statutes which in some manner regulate the performance of first trimester abortions that absent a showing of "undue burden" such regulations are permissible if related to a legitimate state interest. This legal standard of review was adopted by the Sixth Circuit in *Wolfe v. Schroering,* 541 F. 2d 523, 526 (1976), which case involved the challenged constitutionality of a twenty-four hour waiting period statute enacted by the State of Kentucky. The *Schroering* court clearly identified the legal standard adopted by it in the following language:

> The district court invalidated the waiting period requirement because "it attempts to regulate the abortion procedure during the first trimester during which time the state has no compelling interest and thus can pass no regulation affecting this period." *Danforth* [citation omitted] rejected similar reasoning.

Id. at 526. Other courts adopting the "rational basis" versus "strict scrutiny" standard in finding waiting periods constitutionally permissible have included *Akron Center for Reproductive Health, Inc. v. City of Akron,* 479 F. Supp 1172 (N. D. Ohio 1979); *Charles v. Carey,* Case Nos. 79-C-4541 and 79-C-4558, temporary injunction slip opinion, November 16, 1979 (U. S. D. C. N. D. Ill.) rev'd on appeal, *Charles v. Carey, supra;* and *Planned Parenthood v. Blanton,* Case No. 78-2310, slip opinion, August 31, 1979 (U. S. D. C. W. D. Tenn).

Those who oppose abortion regulation laws urge the adoption of the legal standard chosen by the Eighth Cir-

cuit Court of Appeals in the case at bar, the Seventh Circuit in *Charles v. Carey, supra,* and the Second Circuit in *Planned Parenthood League of Massachusetts, et al. v. Francis Bellotti,* No. 80-1580 (Slip Opinion issued February 9, 1981). They argue that any statutes which regulate first trimester abortions, carry criminal penalties, and impose any restrictions to the effectuation of the decision to abort must be supported by a compelling state interest. *Charles v. Carey, supra,* at 777, 778. The decision of the trial court in this action, which was accepted in its entirety by the Appeals Court, specifically addresses this issue by stating:

> Absent an emergency situation, the informed consent and waiting period requirements would stand between the woman's desiring an abortion and obtaining one. This is a direct obstacle to abortion.

Womens Services, P. C. v. Thone, 483 F. Supp. 1022, 1043 (D. Neb. 1979). In so holding the trial court recognized that considerable confusion and conflict existed as to the proper legal standard to be used in light of post-*Roe v. Wade* decisions, including specifically, *Bellotti v. Baird, supra,* which it admitted did possibly indicate "some retreat from the stiff no-interference-during-the-first trimester standard clearly adopted in *Roe v. Wade,* 410 U. S. 164." *Id.,* at 1043. The trial court then summarized its decision to select "the most rigorous standard" in judging the challenged statutes by stating:

> In any event it would take a clearer signal from the Supreme Court than that in *Bellotti v. Baird* to

> demonstrate a retreat from the strict standard announced in *Roe v. Wade* and its progeny.

Id. at 1043.

Once having adopted "the stiff no-interference-during-the-first-trimester standard" the trial court openly admitted that it would ignore "extensive evidence presented by the defendants on the subjects of (1) safety of first trimester abortions and (2) the lack of any true physician-patient relationship in the appellees' abortion clinics."[6] *Id.* at 1044.

Proof of a substantial federal question is further established in view of the passage by at least eight other states of laws imposing a more than bare bones informed consent requirement coupled with a twenty-four or forty-eight hour waiting period.[7] These attempts to enact legis-

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6 In explaining its decision to ignore certain evidence presented by plaintiffs below, the court explained:

> I make no findings of fact with respect to the greatest part of this evidence; that is not appropriate, it would seem, until the Supreme Court is ready to overrule *Roe v. Wade* or at least substantially limit it. I only make those findings of fact necessary to appraise this legislation pursuant to current constitutional standards. In this respect, it cannot be overemphasized that the challenged legislation does not differentiate with respect to trimesters of pregnancy. Thus, all of the legislation must be judged according to the most rigorous standard—that reserved for legislation touching upon the first trimester of pregnancy.

7 Those states enacting such legislation and the appropriate citation are: South Dakota, S. D. Codified Laws § 34-23A-10.1 (Supp. 1980), North Dakota, N. D. Cent. Code, Ch. 14-02.1, Illinois, Ill. Senate Bill 47, enacted October 30, 1979, Missouri, Mo. Rev. Stat. §§ 188.015, et seq., Louisiana, La. Rev. Stat. Ann. § 40-1299.35.1, et seq. (West Supp. 1979), Tennessee, Tenn. Code Ann. Ch. 39-302, Kentucky, Ky. Rev. Stat. § 436.023, Massachusetts, Mass. Gen Laws Ann. Ch. 112, § 12 (s), and Maine, 22 Me. Rev. Stat.Ann. §1598.

lation aimed at insuring that the abortion patient has an "awareness of the decision and its significance" (*Planned Parenthood of Central Missouri v. Danforth, supra,* 428 U. S. at 67) have caused in every instance litigation.[8]

We would respectfully submit to this Court that there is considerable confusion and conflict arising from this Court's initial statement in *Roe v. Wade* that: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" (*Roe v. Wade,* 410 U. S. at 164) and language contained in subsequent decisions wherein state or federal laws regulating, directly or indirectly, the abortion decision making process have not been subjected to "strict scrutiny." *See, Bellotti v. Baird,* 428 U. S. 147 (parental notice); *Maher v. Roe,* 432 U. S. at 473 (public funding); *Planned Parenthood of Central Missouri v. Danforth,* 428

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8 While not certainly exhaustive, we here list litigation presently being conducted in federal courts wherein the principal issue is the appropriate legal standard to be applied to informed consent and waiting period legislation. *Munson v. Henry,* Case No. Civ. 80-3043 (Cent. Div. S. D. U. S. D. C.); *Leigh v. Olson,* No. A3-79-78 (U. S. D. C N. D.); *Charles v. Carey,* No. 79-C-4541 and 4558 (U. S. D. C. N. D. Ill.); *Planned Parenthood Association of Kansas City v. Ashcroft,* 483 F. Supp. 679 (1980) (on appeal to the Eighth Circuit Court of Appeals); *Margaret S. v. Edwards,* 488 F. Supp. 1981 (1980); *Planned Parenthood v. Blanton,* No. 78-2310 (U. S. D. C. W. D. Tenn.); *Akron Center for Reproductive Health v. City of Akron,* 479 F. Supp. 1172 (1979) (on appeal to the Sixth Circuit Court of Appeals); *Women's Community Health Center, Inc. v. Cohen,* 477 F. Supp. 542 (D. Me. 1979); and *Planned Parenthood League of Massachusetts, et al. v. Francis Bellotti, supra.*

U. S. at 77-79 (informed consent); *Planned Parenthood Association v. Fitzpatrick,* 401 F. Supp. 554 (E. D. Pa. 1975), aff'd 428 U. S. 901 (informed consent); and, most recently, *Harris v. McRae,* 65 L. Ed. 2d 784 at 804-5 (public funding).

Plenary consideration will provide the opportunity for this Court to clearly identify the appropriate legal standard to be applied in judging the constitutionality of state laws regulating the performance of first trimester abortions and in particular the permissibility of statutes which attempt to enhance the giving of informed consent and provide for a waiting period in which information given to the abortion patient can be carefully considered. Absent such a ruling, there will be continuing conflict in the Circuit Courts and repeated attempts by the states to enact constitutionally permissible legislation which will no doubt spawn more litigation.

II.

The factual finding by the trial court that a portion of the informed consent statute, Neb. Rev. Stat. § 28-326 (8) (a) and the forty-eight hour waiting period created "an undue burden" was unsupported by the record.

We immediately recognize that it is rare for this Court to delve into disputed factual findings, but we submit that the trial court's findings stem not only from a failure to fairly weigh the evidence but also involve a misapprehension by it of what is or is not an "undue burden" under *Roe v. Wade, supra,* and its progeny. We also

raise this issue to highlight the necessity for this Court to clearly establish the appropriate legal standard to be adopted by the lower federal courts in reviewing abortion control legislation.

Briefing limitations do not permit us as full a discussion of this issue as we would like, but we do emphasize two important points. First, the trial court admitted that in weighing the evidence it intentionally chose to disregard "extensive evidence" presented by the defendants regarding the long term consequences of first trimester abortions and the unsavory medical practices[9] of appellees' abortion clinics.[10] Secondly, the opinions below do not discuss in any respect the affect of the emergency clause governing the allowed waiver of the forty-eight hour waiting period. The statutory definition applicable to the emergency clause states, "Emergency situation shall mean a condition exists that in the sound medical judgment of the physician the abortion should be performed without delay so as not to adversely affect the best physical or mental health of the woman." Neb. Rev. Stat. § 28-326(7) (Reissue 1979).

We would further submit that the use of the phrase "undue burden" by the trial court must be examined in light of the legal standard adopted by that court. On no less than four occasions the trial court opinion states that

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9 These practices included for example the absence of any counseling at one clinic and the administration, before counseling and the expression of informed consent, of valium to minors at the other clinic.

10 The Statement of the Case at page 4 more fully discusses this evidence.

the analysis of the challenged statutes required "the most exacting judicial scrutiny." *Womens Services, Inc. v. Thone, supra,* at 1042-1044, 1050. Simply stated, the opinions below hold that any abortion regulation which affects the first trimester and carries a criminal penalty creates an "undue burden" because it is a "direct obstacle" to abortion.

The trial court's factual finding of "undue burden" was the product of an improper analysis which made any interference—regardless of its time delay or monetary cost—a "direct obstacle" to an abortion. Under this analysis even a one hour waiting period would be an "undue burden." The record should therefore be looked at anew by this court to determine if the challenged statutes are unduly burdensome or if they are, as we argue, reasonable and related to the legitimate state interest of protecting the decision making process of the abortion patient.

III.

The parental consultation statute, Neb. Rev. Stat. § 28-333 (Reissue 1979), does not violate a minor's abortion liberty right.

The Nebraska parental consultation statute, Neb. Rev. Stat. § 28-333 (Reissue 1979) is, we submit for purposes of constitutional review, identical to the act passed by the Legislature of the State of Utah and found to be without constitutional defect by the Supreme Court of Utah. *H. L. v. Matheson,* 604 P. 2d 907, 913 (Utah 1978), which case is currently docketed in this Court, *H. L. v. Matheson,* Sup. Ct. Doc. No. 79-5903. We offer no further

argument by way of this appeal. We desire only to keep alive this issue pending decision by this Court in *H. L. v. Matheson, supra.*

IV.

A party who faces potential criminal liability under a general criminal accomplice statute has no direct threat of personal detriment sufficient to maintain standing in an action challenging the constitutionality of a state statute.

Article III of the United States Constitution prohibits federal courts from ruling on the constitutionality of state statutes unless the litigants are in actual controversy. *Baker v. Carr,* 369 U. S. 186, 204 (1962). It is undisputed that the appellee Ladies Center, Nebraska, Inc. cannot be prosecuted directly for violations of the challenged statutes since those statutes are directed at licensed physicians and not persons who provide administrative assistance to the physician who performs abortions. In *Doe v. Bolton,* 410 U. S. 179 at 189, this Court observed:

> The parallel claims of the nurse, clergy, social worker, and corporation-appellants are another step removed and as to them, the Georgia statutes operate less directly. Not being licensed physicians, the nurses and the others are in no position to render medical advice. They would be reached by the abortion statutes only in their capacity as accessories or as counselor-conspirators. We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-appellants, and *nothing is gained or lost* by the presence or absence of the nurses, the clergymen, the social workers, and the corporations.

(Emphasis added.) Appellants have not disputed the standing of the other appellees and therefore one might wonder what is "gained or lost by the presence or absence of" the appellee, Ladies Center, Inc. As argued at the trial stage and on appeal, our concern rests with the application of 42 U. S. C. § 1988 which was amended after *Doe v. Bolton* and now permits the award of attorneys fees as costs in any 42 U. S. C. § 1983 action. Appellee, Ladies Center, Inc., in the instant case was awarded $25,898.70 on its claim for attorneys' fees and other costs. *See,* App. F. The presence of appellee, Ladies Center, Nebraska, Inc., was not essential, or for that matter noticeably beneficial to the presentation of the alleged civil rights violations by the other appellees; at very best, it was cumulative to the efforts of those appellees whose standing we do not challenge.

This Court has continuously stressed its concern about the cost of modern day litigation which cost is always enhanced by the presence of unneeded parties. If not reversed, the holding of the Eighth Circuit permitting Ladies Center, Nebraska, Inc. to maintain standing will only encourage proliferation of multi-party civil rights litigation without any resulting benefit but with the added exposure to good-faith defendants of excessive attorney fee awards.

V.

The trial court erred in declining to abstain from the ruling on Neb. Rev. Stat. § 28-326 (8) (a) (Reissue 1979).

The abstention doctrine requires a federal court to withhold consideration of the constitutionality of an un-

construed state statute where that statute is "susceptible of a construction by the state judiciary" which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem.

Appellants' abstention motion dealt with the interpretation of Neb. Rev. Stat. § 28-326(8) (Reissue 1979) which statute defined "informed consent" as follows:

> Informed consent shall mean a written statement, voluntarily entered into by the person upon whom an abortion is to be performed, whereby she specifically consents to such abortion. Such consent shall be deemed to be an informed consent only if it affirmatively appears in the written statement that the person upon whom the abortion is to be performed has been advised (a) of the reasonably possible medical and mental consequences resulting from an abortion, pregnancy, and childbirth, (b) of possible alternatives to abortion, including childbirth and adoption and including that there are agencies and services available to assist her to carry her pregnancy to a natural term, and (c) of the abortion procedures to be used. Such statement shall bear the signature of the person upon whom the abortion is to be performed and be signed by the attending physician.

Appellants argued at trial that *per se* compliance with the statute would exist if a written statement was voluntrily executed by the patient and if it contained language affirming that the patient had been informed of the topics identified in subparagraphs (a), (b), and (c) of the above cited statute. The trial court interpreted the statute to permit a criminal prosecution based upon an allegation that the physician had not in fact given the identified topics of information. In his order of August 9,

1979, Judge Urbon agreed that "the proposed construction [defendants'] of the informed consent provision would significantly affect the nature of the constitutional questions involved."

It is unquestioned that under controlling Nebraska case law it is the duty of a court to adopt a construction which, without doing violence to the fair meaning of the statute, will render it valid. *Anderson v. Tiemann*, 182 Neb. 393, 155 N. W. 2d 322 (1967). We submit that the court's interpretation of § 28-327 was plain error and that, at the very least, the court should have abstained so as to allow state court interpretation of the statute's requirement.

We further add that the court similarly erred in interpreting Neb. Rev. Stat. § 28-343 (Reissue 1979) by finding that the referral of an abortion patient would amount to a "prescription" and that the reporting of such referrals would therefore be unconstitutional.

If *any* doubt existed as to the proper interpretation of these statutes, the trial court should have abstained and permitted state court review. *Bellotti v. Baird*, 438 U. S. at 147.

CONCLUSION

In *Planned Parenthood v. Danforth* this Court recognized the importance of an informed abortion decision. The Nebraska Unicameral has acted to enhance, in a needed and reasonable manner, the giving of informed

consent. Absent a clear and convincing showing that the statutes will unduly burden the abortion privacy right, the severe application of a finding of unconstitutionality is not warranted. In fact, such a finding runs counter to the real and present needs of women seeking care at abortion clinics like those of appellees.

The impact of the issues raised herein are substantial. Failure to reverse the decision of the Eighth Circuit Court of Appeals will send a clear message to the courts now examining similar legislation and to state legislatures studying yet to be enacted statutes that the states may not seek to protect women seeking first trimester abortions by attempting to insure that their decision is made knowingly and without undue pressure or influence of abortion profiteers.

Respectfully submitted,

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